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80-1386

NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND FRENCH,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the petitioner was denied due process and equal protection under the law under the Fourteenth Amendment where the prosecution failed to make a complete pretrial disclosure of a statement made by the petitioner to a police officer as required by the Criminal Procedure Law of New York and then used the omitted portion of the statement at trial?

2. Whether the petitioner was denied due process and equal protection of the law when after failing to specify the evidence of a statement to an officer intended to be offered prior to trial the court allowed the omitted evidence to be admitted at trial without proof of good cause for failure to serve a complete notice as required by the Criminal Procedure Law of New York?

3. Whether the petitioner was denied due process and equal protection under the law when after failing to specify the evidence of a statement to an officer intended to be offered prior to trial the court allowed the omitted evidence to be admitted at trial without requiring the prosecution to serve such belated notice of intent to offer the evidence as required by the Criminal Procedure Law of New York?

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Edmund French, petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Division, Second Department, of the New York State Supreme Court which affirmed a judgment of the Supreme Court, Richmond County, convicting the petitioner of the crime of assault in the first degree under Section 120.10 of the New York State Penal Law. The New York State Court of Appeals has denied petitioner leave to appeal to that court and petitioner has exhausted all of his state remedies.

OPINIONS BELOW

The opinion of the Appellate Division, Second Department, of the Supreme Court of the State of New York affirming petitioner's conviction and the Order of the Honorable Jacob D. Fuchsberg, Judge of the New York Court of Appeals, denying leave to appeal to that court are as yet officially unreported. Copies of said opinions, however, are made a part hereof and are set forth in Appendix A.

JURISDICTION

The judgment of the Appellate Division, Second Department, of the Supreme Court, State of New York reaffirming petitioner's judgment of conviction was entered on December 1, 1980. Application for leave to appeal to the New York State Court of Appeals was denied on December 18, 1980. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fourteenth Amendment to the United States Constitution. Section 710.30 of the Criminal Procedure Law of the St e of New York sets forth the procedures required of the people whenever they wish to introduce at a trial evidence of a statement made by a defendant to a public servant. (See Appendix B).

STATEMENT OF THE CASE

Edmund French was indicted for Assault in the First Degree and Criminal Possession of Weapon in the Second Degree (a loaded pistol) and was so convicted after trial by jury. At sentence the weapons charge was dismissed and a mandatory minimum sentence of one and one-half years to four years was imposed for the assault charge.

Mr. French was the manager of a bar near his home. His nephew, Robert Schnell, came to the bar shortly after midnight on August 26, 1979 despite having been told by the petitioner to stay away. Schnell was ejected after throwing a glass. He was beaten in the process. He was, by his own admission, very drunk.

At 4:00 A.M. Schnell, together with a brother who came to his home from another part of the City at his request after the bar room incident, met the petitioner outside the petitioner's home.

According to the testimony of John Schnell they were walking to a car and had no weapons when they saw the petitioner and his wife in front of their home seated in lawn chairs. Both claimed they were unarmed. The brother said that Robert Schnell and the petitioner confronted each other and that the petitioner shot him from a distance of 15 to 20 feet. The petitioner and his wife

testified that both Schnell brothers ran toward them with Robert threatening to blow petitioner's head off. Robert had a hand gun and his brother had a tire iron or pipe. The petitioner stated that he wrested the gun from Robert and shot him in self defense.

The prosecution prior to trial served a written notice pursuant to Criminal Procedure Law Section 710.30 (Appendix B) stating that the petitioner had made the following admission to Police Officer O'Halloran:

> "Defendant stated Schnell was his nephew. They had been arguing off and on for 6 months. Schnell had been harassing him and his wife. He couldn't take the harassment any longer so he shot Schnell."

The defense made no pre-trial motion to suppress the foregoing statement. At the trial on the direct case, the police officer testified to the disclosed statement and then added that when asked where he got the gun the petitioner responded that "he found it". This was objected to and the jury was instructed to disregard the testimony concerning French's finding of the gun. The record reveals that the court excluded the admission of finding the gun because the people failed to include it in the written notice. (Pages 208-213 Record on Appeal Appendix C)

The People called Police Officer O'Halloran in rebuttal and, over objection, he testified that the petitioner told him that he (the petitioner) found the gun. The People offered no proof as to good cause for failing to give notice of this admission. The People offered no written notice of their intent to offer this additional admission in advance of the actual testimony. (Pages 573-575 Record on Appeal Appendix D).

REASONS FOR GRANTING THE WRIT

BY FAILING TO DISCLOSE AND GIVE NOTICE OF THE ADMISSION CONCERNING THE FINDING OF THE GUN THE PEOPLE DEPRIVED THE PETITIONER OF A FAIR TRIAL.

There is no doubt that the notice referred to in CPL Section 710.30 is a written notice (*People v. Iveys,* 67 A.D. 2d 349). In *People v. Greer,* 42 NY 2d 170 the Court of Appeals dealt with a remarkably similar case. In *Greer* the defendant charged with rape admitted the intercourse claiming consent and prior intimacies with her. The deficient notice omitted the inculpatory statement that he did not know the woman's name. The Court ruled that in the context of the case with the admissions of intercourse and claimed consent that the testimony that the defendant did not know the name of the woman was crucial. In the same way it was crucial whether a defendant who maintained he took the gun in a struggle should be charged with an admission of finding the gun when the People never gave notice of it.

The People never made any offer of proof as to "good cause" for their failure to include the admission of finding the weapon. The rebuttal testimony was introduced over the objection of the defense.

CPL Section 710.30 set forth in Appendix B, prescribes exactly what must be done by the People when they wish to offer a defendant's statement. The defendant must be served with a notice of intention specifying the evidence. The New York Courts have made it clear that this means a full and fair disclosure (*People v. Greer, supra.*).

The notice must be served within fifteen days after arraignment and before trial. The defendant must be afforded an opportunity to suppress such statement before trial.

The statute gave the People a chance to correct an error or omission in the notice "For good cause shown . . .". The People provided no proof whatsoever to establish good cause for their omission. Good cause cannot be presumed for the record is totally barren. Indeed since the testimony came from the arresting officer it would be difficult to visualize any circumstance under which the People could show good cause for the insufficient notice and the belated offer of a complete statement (*People v. Briggs,* 38 NY 2d 319, 324; *People v. Spruill,* 47 NY2d 869).

The statute further requires that if good cause can be established then and only then the Court may permit the people to serve a notice of a statement belatedly and then "must accord the defendant reasonable opportunity thereafter to make a suppression motion." No testimony was taken on the requirement of good cause and no subsequent notice of such intention to offer an admission in evidence was served.

The importance of Police Officer O'Halloran's rebuttal testimony cannot be gainsaid. The prosecution was able to expressly impeach the petitioner by a police officer. The Petitioner and his wife testified to their version. The complaining witness and his brother testified to their version and the principals were clearly in conflict. The admission to the Police Officer to the effect that the Petitioner had the gun prior to the confrontation gutted the defenses of self defense as to the assault and transitory possession as to the possession of a weapon. New York has ruled that the prosecution may not lay back and use damaging testimony to impeach without complying with CPL Section 710.30 (*People v. Barrie,* 74 AD 2d 576). The People cannot now contend that this was inconsequential. In summation the prosecutor called the admission of finding the gun the "most important piece of evidence in this case." (Page 743-745 Record on Appeal Appendix E). They deliberately introduced the evidence to bolster the Schnell

brothers and to impeach petitioner and his wife. Credibility was an issue in this case for the petitioner, a forty-eight year old man, had never been convicted of a crime and the complaining witness had a conviction for larceny.

Indeed the trial judge observed in initially excluding the admission about finding the gun that he ". . . was not sure that irrevocable harm hasn't been done already. Specifying the evidence, not the substance of the evidence, specifying the evidence." (Page 213 Record on Appeal Appendix C) Subsequently—the trial court, acting in reliance on *People v. Wise,* 46 NY2d 321, allowed the testimony of Police Officer O'Halloran to be introduced in rebuttal (Page 573 Record on Appeal Appendix D). *People v. Wise* stood for the proposition that admissions suppressed for failure to comply with *Miranda v. Arizona,* 384 U.S. 436 could be used to impeach a defendant witness. In *People v. Wise* a motion to suppress was made and there was no question of a defective or inadequate notice. In this case no motion to suppress was made and hence the People were obligated to give a complete and proper notice. To further exacerbate the matter the court failed to instruct the jury either at the time the testimony was given or in its charge that the officer's rebuttal was solely to impeach French's credibility and was not to be considered as tending to establish petitioner's complicity in the crime.

It has been continually held that constitutional guarantees of due process and equal protection call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons. *Griffin v. Illinois,* 351 U.S. 12. In *Griffin, supra,* the Supreme Court citing *Chambers v. Florida,* 309 U.S. 227 and *Yick Yo v. Hopkins,* 118 U.S. 356, stressed that the central aim of our entire judicial system was that all persons charged with crimes must so far as the law is concerned stand on an equality before the bar of justice in

every American Court. It has been consistently held that criminal laws of the state must be applied equally to all defendants. The court in *Loper v. Beto,* 440 F.2d 934 (5th Cir. 1971), rev on other grounds 405 U.S. 473 (1972), stated at page 941:—

> "It is elemental that the right to equal protection under state law includes the right to be tried in the same manner as others accused of similar infractions."

The pertinance of this comment in this case is striking.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A—CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

EDMUND FRENCH

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
December 18, 1980

s/ Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order of the Appellate Division, Second Department dated December 2, 1980 affirming a judgment of the Supreme Court, Richmond County rendered May 21, 1980.

MILTON MOLLEN, P.J.
VITO J. TITONE
LEON D. LAZER
JOHN P. COHALAN, JR., JJ.

__ AD2d __

A—November 18, 1980

2684 E

The People, etc., respondent,
v Edmund French, appellant.
(Ind. No. 339/79)

Anthony J. Crecca, Staten Island, N.Y., for appellant.

Thomas R. Sullivan, District Attorney, Staten Island, N.Y. (George E. McVay of counsel), for respondent.

Judgment of the Supreme Court, Richmond County (BARLOW, J.), rendered May 29, 1980, affirmed (see *People v. Crimmins,* 36 NY2d 230).

This case is remitted to the Supreme Court, Richmond County, for further proceedings pursuant to CPL 460.50 (subd 5).

MOLLEN, P.J., TITONE, LAZER and COHALAN, JJ., concur.

December 1, 1980 PEOPLE v. FRENCH 2684E

APPENDIX B—SECTION 710.30 OF THE CRIMINAL PROCEDURE LAW

§710.30 Motion to Suppress Evidence; Notice to defendant of intention to offer evidence.

1. Whenever the people intend to offer at trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

2. Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70. As amended L.1976, c.8, §2; L. 1976, c.194, §3.

APPENDIX C—EXCERPT FROM TRANSCRIPT OF TESTIMONY

Q. Tell the jury just what happened when you approached him.

A. I approached him and asked him what had happened, and he stated to me he just had an altercation with the complainant, and it's been an on-going dispute, more or less, for the last six months, and the complainant had been in his house that night, had an argument with his wife and destroyed some property. He says I just couldn't take it any more, I had an argument with him and I shot him.

Q. Did you further question—you further have any conversation with him?

A. Yes, I did.

Q. What did that involve?

A. I had asked him where the gun was.

Q. Did he respond?

A. No.

Q. What happened next?

A. A woman whom I now know, I believe it's his wife, Helen, directed Officer Zarrilli to his address, 216 Moreland Avenue.

Q. You mean the defendant's address?

A. Mr. French's address, and they had gone upstairs, and in a matter of seconds, they came out and Officer Zarrilli handed me a gun.

Q. What did you do with that gun?

A. I secured the gun in my pants pocket.

Q. What did you do with Mr. French, if anything?

A. I had asked Mr. French where he had got the gun.

Q. What did he tell you?

A. He said he found it.

MR. PETERSON: Objection, Judge.

THE COURT: You asked whom?

THE WITNESS: Defendant.

THE COURT: Overruled.

MR. PETERSON: May we have a side bar.

(Whereupon, a discussion was held off the record at the side bar outside the presence of the jury.)

MR. CRECCA: Judge, if the Court pleases, the defense will move to strike the testimony of this gentleman, especially the latter portion of same.

THE COURT: The entire testimony?

MR. CRECCA: The latter portion.

THE COURT: The question with regard to or the answer allegedly made by the defendant to the effect that he found the gun, that will be stricken, the jury is instructed to treat that answer as if it had never been given. It is not part of the evidence in this case.

CONTINUING DIRECT EXAMINATION

BY MR. O'SHEA:

Q. Officer O'Halloran, after you spoke to Mr. French, did there come a time when you arrested him?

A. Yes.

Q. What did you do with him physically?

A. I placed handcuffs on him and I put him in my radio car.

Q. And where did you go with him?

A. I then took him to the 120 Precinct for central booking.

Q. Did you have any conversation with Mr. French after you put him in the automobile?

A. Yes, I did.

Q. Tell the jury just what was said by you, what was said by the defendant.

THE COURT: Before you do that, let me see that notice again.

(Whereupon, a discussion was held off the record at the side bar outside the presence of the jury.)

THE COURT: We will take a short recess, I'm sorry to send you out so soon again. You may step out.

(Jury leaves the Courtroom).

THE COURT: Section 710.30 of the Criminal Procedure Law requires the People to serve a notice on the defense attorney within a certain time limit, 15 days after arraignment and before trial specifying the evidence intended to be offered. Now, let me see the 710.30 notice that was in fact given. I note that the phrase specifying the evidence doesn't read to me giving the substance of the evidence. It says specifying. The word specifying comes from specific, and to me means specific.

MR. O'SHEA: I think it is specific, of course, we have it in writing or in tape where we can give them, where we have an oral statement that goes on for some time, I don't think the statute requires that we give a verbatim statement of that.

THE COURT: I am sure the law, that the law will allow a little variation in language if it's oral, but not leaving out the only truly incriminating part of the statement.

Now, the substance of the statement which is set forth in the 710.30 notice served in this case says the defendant stated Schnell was his nephew, they had been arguing on and off for six months. Schnell had been harassing him and his wife. He couldn't take the harassment any longer, so he shot Schnell.

Then comes this extra thing that he was asked where he got the gun and he said he found it. Absolutely critical in a self-defense case, I would think.

Now, I understand that was included in the officer's notebook, a copy of which was delivered to the defense attorney after trial began. Correct?

MR. O'SHEA: That's correct. Which I think counsel was then on notice, and he could move if he so wished to suppress it, I think the statute allows it.

THE COURT: Well, that might be true, but he

didn't, and in any event, I am not going to allow any testimony as to any statement of this defendant except that which is set forth in the 710.30 notice. I am not sure that irrevocable harm hasn't been done already. Specifying the evidence, not the substance of the evidence, specifying the evidence.

APPENDIX D—EXCERPT FROM TRANSCRIPT OF TESTIMONY

MR. O'SHEA: No, sir. The People have a rebuttal case.

THE COURT: Would you state what the rebuttal case is?

MR. O'SHEA: Well, Judge, initially, today I have a rebuttal of Police Officer O'Halloran under People versus Wise, a Court of Appeals case. I intend to call him regarding some substance of a statement Mr. French allegedly made to him.

THE COURT: What substance of a statement?

MR. O'SHEA: In particular, Judge, that he found the gun that he shot Bobby Schnell with.

THE COURT: Before I rule on whether or not that is appropriate rebuttal, do you wish to be heard, Mr. Peterson?

MR. PETERSON: Judge, we will object to that under People versus Rahming. I think it would be improper rebuttal. We will note our objection, if the Court pleases.

THE COURT: Noted. I believe that People versus Wise—do you have the citation?

MR. O'SHEA: Yes, 46 N.Y. 2nd 321.

THE COURT: —specifically deals with this situation, and being a later case must overrule, either expressly or by implication, People versus Rahming. Anything else the People are going to offer on rebuttal?

MR. O'SHEA: Well, Judge, at the—

THE COURT: Are you prepared to go ahead at this point?

MR. O'SHEA: I am prepared to go ahead with that officer. If my other witnesses are not available, I would like to go over until Monday morning for further rebuttal witnesses.

THE COURT: Well, we will see what— Let's take a

short recess. We will have this witness anyway.

(Short recess taken.)

(The defendant being present at counsel table, the jury enters courtroom; case duly recalled.)

MR. O'SHEA: The People call Officer O'Halloran to the stand.

THE COURT: Ladies and gentlemen of the jury, we are now at the rebuttal stage of this trial. This witness has been called by the People as a rebuttal witness. P.O. JOHN O'HALLORAN, called by the People, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

DIRECT EXAMINATION BY MR. O'SHEA:

Q. Officer O'Halloran, you testified earlier in this case that the early morning hours of August 26th, I believe, that this defendant, Mr. French, was in your automobile on the way to the police station, is that correct?

A. Yes.

Q. You further testified that you gave him his Miranda warnings, as you relayed it in your earlier testimony, is that correct?

A. Yes.

Q. In addition to the conversation that you have already told us about in your earlier testimony, did you have any conversation with this defendant, Mr. French, regarding where the gun came from, sir?

A. Yes.

Q. Tell this jury, please, what you asked Mr. French regarding that and what he told you?

A. I asked him where he had received the gun from and he said he found it.

Q. I am sorry, he said what?

A. I asked him where he received the gun from and he said he found it.

MR. O'SHEA: Nothing further.

APPENDIX E—EXCERPT FROM SUMMATION

Mr. French, that very night, within minutes told the police officer that he couldn't take the harassment any longer and that he shot his nephew. And again, the most important piece of evidence in this case is that he shot his nephew with a gun that he found. Completely opposite, completely opposite as to what he told you in this witness stand. And yet, will you disbelieve Police Officer O'Halloran who has no ax to grind in this case? Does he know the people involved and again, not testifying from memory, but you have a photocopy of his memo book that he made that very night and he states that he shot the complainant with a gun that he found.

We go back again to the duty as a jury or to discuss and decide who you can believe and I submit to you that the testimony of this defendant is testimony to get himself out from under. To save his neck and his wife's testimony is in support of that direction and that it flies in the fact of logic. That it flies in the fact of the story of John Schnell and Bobby Schnell and most importantly, it flies in the face even of what he told a neutral detached police officer that very night.

You remember Ed French's testimony on the stand. Admitted basically all of that statement, but denied that part which is so damaging to him. Ladies and gentlemen, looking at what Mr. French told the police that night and considering not only what's on that piece of paper, but the testimony of officer O'Halloran as to what his conversation was with the defendant. Both on direct and cross and on rebuttal when he was called back as a witness and I asked him, Officer, did Mr. French tell you that he shot his nephew with the gun he found and yes, he did. Do you remember there was some further examination by counsel, and I get up and say, Officer O'Halloran, is there any doubt in your mind who the "He" was in the gun, "He" found and Officer O'Halloran said absolutely not, his gun. A gun he found, the defendant denied that part. It was so damaging to him.